Supreme Court, U.S.
FILED
SEP 24 1992
OFFICE OF THE CLERK

No. 92-351

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

LEONARD E. HELLER, Secretary,
KENTUCKY CABINET FOR HUMAN
RESOURCES - - - - - - - - Petitioner

versus

SAMUEL DOE, by His Mother and
Next Friend, MARY DOE, Et Al. - Respondents

RESPONDENT'S BRIEF IN OPPOSITION

KELLY A. MILLER
Counsel of Record
902 W. Highland View Drive
Boise, Idaho 83702
Telephone: (208) 336-1290

RONALD MARSTIN
Attorney at Law
Legal Aid Society, Inc.
425 W. Muhammad Ali Blvd.
Louisville, Kentucky 40202
Attorneys for Respondents

September 24, 1992

WESTERFIELD-BONTE CO., 819 W. KENTUCKY-P.O. BOX 3251, LOUISVILLE, KY.

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. May Kentucky, consistent with the equal protection clause of the fourteenth amendment, involuntarily commit mentally retarded adults to state treatment facilities under a clear and convincing standard of proof, while requiring proof beyond a reasonable doubt for involuntary commitment of similarly situated mentally ill adults?

2. May Kentucky, consistent with the equal protection clause of the fourteenth amendment, permit third persons to participate as if they were parties in the involuntary commitment of mentally retarded adults when they are not permitted to participate as if parties in the involuntary commitment of similarly situated mentally ill adults?

3. May Kentucky, consistent with due process of law, permit third persons to participate as if they were parties in the involuntary commitment of mentally retarded adults?

TABLE OF CONTENTS

	PAGE
Counterstatement of the Questions Presented	i
Table of Contents	ii
Table of Authorities	iii
Counterstatement of the Case	1– 8
Summary of the Argument	8– 9
Reasons for Denying the Writ	9–15
I. The Court Of Appeals Decision Is Grounded In Long-Established Supreme Court Precedent Enunciating The Principles Of Equal Protection And Due Process	9–13
II. The Court Of Appeals Decision Is Not In Conflict With Any Other Court Of Appeals Nor Does It Misapply This Court's Opinion in *Kremens* v. *Bartley*	13–15
Conclusion	15–16

TABLE OF AUTHORITIES

	PAGE
Cases:	
Addington v. *Texas*, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979)	12
Baxstrom v. *Herold*, 383 U.S. 107, 86 S.Ct. 760, 15 L.Ed.2d 620 (1966)	10, 11, 13, 14
City of Cleburne v. *Cleburne Living Center, Inc.*, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985)	10, 13
Doe v. *Austin*, 848 F.2d 1386 (6th Cir. 1988), *cert. den.*, 109 S.Ct. 495 (1988)	10, 13, 14
Humphrey v. *Cady*, 405 U.S. 504, 92 S.Ct. 1048, 31 L.Ed.2d 394 (1972)	12
Jackson v. *Indiana*, 406 U.S. 715, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972)	10, 11, 13
Kremens v. *Bartley*, 431 U.S. 119, 97 S.Ct. 1709, 52 L.Ed.2d 184 (1977)	8, 9, 10, 13, 14
Vitek v. *Jones*, 445 U.S. 480, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980)	12
Kentucky Statutes:	
K.R.S. Ann. § 202A	2
K.R.S. Ann. § 202A.076(2)	10
K.R.S. Ann. § 202B	2, 4, 6
K.R.S. Ann. § 202B.050(2)	2, 7

No. 92-351

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

LEONARD E. HELLER, Secretary, KENTUCKY CABINET FOR HUMAN Resources - - - *Petitioner*

v.

SAMUEL DOE, by His Mother and Next Friend, MARY DOE, Et Al. - - - - - - - *Respondents*

RESPONDENT'S BRIEF IN OPPOSITION

The respondents, Samuel Doe and a class of mentally retarded adults in Kentucky, respectfully request that this Court deny the petition for a writ of certiorari for the reasons stated in this brief.[1]

COUNTERSTATEMENT OF THE CASE

Neither the factual situation which gave birth to this case nor its subsequent evolution is accurately reflected in

---

[1] The petitioner, Leonard E. Heller, heads the Kentucky Cabinet for Human Resources (Cabinet) and is the Kentucky official responsible for the administration of the state's four intermediate care facilities for mentally retarded individuals (ICF/MR) (formerly called mental retardation residential treatment centers). The respondents include the individual named plaintiff, Samuel Doe, and a certified class of mentally retarded adults in Kentucky.

the petitioner's statement of the case. Both are necessary to this Court's proper disposition of the petition for certiorari.

At the start of this lawsuit in 1982, Kentucky had a comprehensive statutory scheme which governed the civil commitment of both mentally ill and mentally retarded individuals to residential treatment centers. *Ky. Rev. Stat. Ann.* Chapters 202A and 202B (Baldwin 1982). This statutory scheme provided an array of procedural rights, including the right to counsel, the right to a judicial hearing, the right to the beyond a reasonable doubt standard of proof, and the right to annual judicial review of the commitment. These rights in their entirety were explicitly made applicable to mentally retarded persons by *Ky. Rev. Stat. Ann.* § 202B.050 (Baldwin 1982).

Rather than conform to these statutory provisions concerning the admission of mentally retarded adults, the Kentucky Cabinet for Human Resources [Cabinet] adopted a policy by which it characterized as "voluntary" virtually every commitment to a state mental retardation facility. By using this fiction, the Cabinet routinely circumvented the statutory commitment procedures and adopted an informal admissions process called the Record Review Committee [RRC].[2] The RRC did not use the statutory

[2] It is for this reason that *Ky. Rev. Stat. Ann.* Chapter 202B was indeed, as the Cabinet notes, one of the "least used chapters." Petition for Writ of Certiorari [Petition] at 6.

Individuals also had substantive rights under Kentucky law, including the requirement that a civil commitment could not take place unless (1) the individual presented a danger to self or others, and (2) the hospitalization represented the least restrictive mode of treatment. Furthermore, if the criteria for commitment were no longer met, the individual was entitled to immediate release. *Ky. Rev. Stat. Ann.*, Chapters 202A and 202B (Baldwin, 1982). In circumventing class members' procedural rights, the Cabinet also denied them these substantive rights.

admissions standards, but instead employed unpublished criteria to determine the mentally retarded individual's suitability for admission to state mental retardation facilities. 22a-23a.[3]

The individual named respondent, Samuel Doe, filed a lawsuit on behalf of himself and other similarly situated mentally retarded individuals in August 1982.[4] The class sought the benefit of the existing state statutory standards and procedures concerning their commitment to state facilities. In an opinion dated March 28, 1984, the District Court initially rejected respondents' challenge to the Cabinet's failure to follow Kentucky's statutory commitment procedures for the mentally retarded. 60a-72a.[5] On

[3] References to the Appendix to the Petition for Certiorari are denoted by a page number followed by the letter "a." Citations to the record in the District Court are indicated as "R," followed by the docket number of the document and the name of the document.

[4] In 1971 Samuel Doe, born with a condition of mental retardation, was placed at the age of 18 in the custody of the state officials of the agency which is now known as the Kentucky Cabinet for Human Resources [Cabinet]. Under the authority of the Secretary of the Cabinet, he was placed at the Outwood State Hospital in Dawson Springs, Kentucky. R.76: Mary Doe Affidavit at 2-3; Appendix in Support of Motion for Summary Judgment at 37-38. On April 1, 1977, after six years of institutionalization, Doe was adjudicated as incompetent by Christian County Circuit Court on a petition by the state. *Id.* at 4. No other judicial proceedings occurred before or since with respect to the respondent's admission, continued confinement or release from Outwood. *Id.*

[5] The Cabinet had a policy of permitting parents to veto a decision by a state facility to seek community placement for their children in lieu of continued confinement. In this first opinion, the District Court held that this practice violated the adult children's due process rights under the fourteenth amendment. 72a. The Cabinet did not appeal.

January 9, 1986, the District Court reconsidered class members' challenge and ruled that the admission practices adopted by the Cabinet were a violation of equal protection. 54a-58a. The court ordered the Cabinet to begin using existing state statutory standards and procedures for the admissions of mentally retarded adults within 60 days of its order. 58a-59a.

The 1986 Kentucky General Assembly responded swiftly, striking from *Ky. Rev. Stat. Ann.* § 202B the section guaranteeing the mentally retarded a judicial determination prior to commitment, and defining as voluntary any commitment effected on the application of a retarded person's parents or guardian. 41a; R.120: Plaintiffs' Motion for Preliminary Injunction, Appendix at 1-6.

In response, the class sought a declaration that the 1986 legislative amendments were unconstitutional. The District Court granted relief on November 20, 1986, finding that Kentucky could not, consistent with due process and equal protection, deprive mentally retarded adults of a hearing concerning the propriety of their initial commitment to state facilities. 59a.[6] The Cabinet appealed the

[6] Petitioner asserts that the "District Court's preliminary injunction of November 20, 1986, had unanticipated results as evidenced by the case of Tracy Horton." Petition at 8. This mischaracterizes the Tracy Horton case, which was an anticipated, not an unanticipated, result of the District Court's order that the state grant a hearing to mentally retarded adults facing involuntary commitment. It was fully anticipated that juries would sometimes find that the state had not met its burden of justifying an involuntary commitment under *Ky. Rev. Stat. Ann.* Chapter 202B and, specifically, that a person could be provided for more appropriately in a setting less restrictive than a state institution.

(footnote continued)

grant of a preliminary injunction to the Court of Appeals for the Sixth Circuit. On June 15, 1988, the Court of Appeals issued an opinion affirming in part and reversing in part. 19a-38a.

The Court of Appeals reversed that portion of the District Court's decision which held that due process required a judicial commitment hearing, but affirmed the District Court's ruling that the Record Review Committee system did not conform with due process. 28a-34a.

The Sixth Circuit next held that the recognized distinctions between the mentally ill and the mentally retarded were not rationally related to Kentucky's statutory exclusion of mentally retarded individuals from civil commitment procedures. 34a-35a.[7] On equal protection grounds, there-

(footnote continued)

Moreover, petitioner's reliance on the Thomas Horton deposition is improper. 8a-9a. *See* R.213. An agreed order entered by the District Court on November 20, 1990, limited to 30 days the time for the parties to file discovery pertinent to a motion for summary judgment then pending. R.211: Agreed Order. On January 10, 1991, 21 days past the deadline, the Cabinet deposed Thomas Horton. Counsel for the class members objected on the record to the use of the deposition for summary judgment purposes, R.213: Horton depo. at 4-6; it was not used; and class members, accordingly, had no occasion to register this objection with the District Court.

[7] "The Commonwealth identifies two interests which it argues are served by the distinction it draws between the mentally ill and the mentally retarded: (1) an interest in not imposing unnecessary procedural obstacles which might prohibit legal guardians from seeking available services for their mentally retarded wards; and (2) its interest in prioritizing diagnostic and service resources to the mentally retarded as soon as possible instead of expending resources in time-consuming procedures prior to admission. However, surely these interests apply to the mentally *ill* as well; the Commonwealth cannot show that the *distinction* which is drawn is rationally related to its stated purposes." 35a.

fore, the Court of Appeals affirmed the District Court's holding and required judicial hearings for mentally retarded adults "either upon admission, or, if now committed, when they reach adulthood." 35a.

This Court denied the Cabinet's petition for writ of certiorari. 109 S. Ct. 495 (1988).

The cycle of events which again brings respondents to this Court began with the revision of *Ky. Rev. Stat. Ann.* § 202B enacted by the 1990 Kentucky General Assembly.[8] This revision came after the parties had submitted to the U. S. District Court on October 30, 1989, but before the court had acted on it, an agreed final compliance plan designed to implement the decisions of the Sixth Circuit and the District Court. R.189A: Agreed Final Compliance Plan.[9]

While the agreed final compliance plan would have required Kentucky to give to adult mentally retarded persons the same rights and procedures with respect to commitment as the state gives to the adult mentally ill, the 1990 amendments (House Bill 511) gutted those pro-

[8] If the petitioner "has been required to actually litigate this matter over the course of ten years," Petition at 12, it is not due to any lack of guidance by this Court on the issues presented, as the petitioner claims; rather, it is due to the Kentucky General Assembly's twice attempting, in 1986 and 1990, to evade rulings by the United States District Court for the Western District of Kentucky and the Court of Appeals for the Sixth Circuit. Petitioner's speculations about the intent of the General Assembly in revising the civil commitment statute are totally without foundation in this court record. See Petition at 6 ¶ 2, 7 ¶¶ 1 and 2, and 9 ¶¶ 2 and 3.

[9] No number has been assigned this document. Since it occurs on the district court docket continuation sheet between entries 189 and 190, respondents here designate it R.189A.

tections as far as the mentally retarded were concerned, lowering the standard of proof required to institutionalize them and giving family members and others extraordinary influence over the commitment process.[10] On May 18, 1990, respondents challenged as unconstitutional various sections of the new legislation. R.201: Plaintiffs' Motion for Preliminary Injunction and/or Summary Judgment. On July 1, 1991, the District Court addressed four issues raised by class members, holding (1) that procedures established by House Bill 511 for voluntary admissions and for legal representation are constitutional, 13a, 16a, but (2) that the failure to provide for release of voluntarily admitted adults at their own request is unconstitutional, 14a; (3) that the provision allowing mentally retarded persons to be committed under a clear and convincing standard of proof is unconstitutional under the equal protection clause, 15a-16a; and (4) that provisions allowing third parties to par-

[10] Petitioner distorts the factual situation with regard to the standard of proof prior to the 1990 amendments in stating that "There was no separate specified standard of evidence for involuntary proceedings for admission to one of CHR's mental retardation facilities." Petition at 6-7. Prior to the 1990 amendments, the incorporation by reference in *Ky. Rev. Stat. Ann.* 202B.050 to the rights of mentally ill persons gave the mentally retarded the right to a judicial hearing under the beyond a reasonable doubt standard. 4a, 11a, Petition at 6. The 1990 amendments eliminated the reference and lowered the standard for the mentally retarded. 11a, 14a.

The third parties whom House Bill 511 would permit to play a role in the commitment proceedings were variously described in the statute as "guardians and immediate family members" (permitted to act as parties and to appeal "any adverse decision"), "parent or guardian" (permitted to hire expert witnesses), and "guardian, limited guardian, or other authorized representative" (permitted to appeal a final judgment).

ticipate in commitment proceedings "as if" parties violated class members' due process and equal protection rights, 16a.

The Cabinet appealed to the Court of Appeals for the Sixth Circuit. On June 1, 1992, the Sixth Circuit held that "mentally ill and mentally retarded are identical insofar as they lose their personal liberty by involuntary institutionalization." 7a. Accordingly, the Sixth Circuit ruled that equal protection requires that, since Kentucky applies the reasonable doubt standard in committing the mentally ill, the state must apply the same standard in committing the mentally retarded. 4a-7a. The Sixth Circuit also affirmed the District Court's holding that Kentucky's practice of allowing third persons to participate as if parties in the involuntary commitment proceeding of mentally retarded adults violates equal protection and due process. 7a.[11]

SUMMARY OF THE ARGUMENT

The decision of the Court of Appeals for the Sixth Circuit in this case is grounded in principles of due process and equal protection well-settled by precedent of this Court. The Sixth Circuit is not in conflict with other courts of appeal on the issues decided in this case. Nor does the decision of the Sixth Circuit misapply this Court's opinion in *Kremens* v. *Bartley*, 431 U.S. 119 (1977).

Kentucky statutes require a reasonable doubt standard and do not permit the participation of non-parties in proceedings for civil commitment of the mentally ill. The

[11] As to the constitutionality of the statute's failure to provide for the release of a voluntarily admitted patient upon request, the Sixth Circuit found no actual case or controversy and reversed the District Court on this issue. 3a-4a.

Sixth Circuit found no differences of constitutional significance between the mentally ill and the mentally retarded or the purposes for their commitment that would justify affording the mentally retarded lesser protection in commitment proceedings. 5a. In its analysis, the Court of Appeals properly applied well-established equal protection principles. The Sixth Circuit likewise broke no new ground in finding that, because the decision to commit a mentally retarded adult is not within the discretion of a third party—even a parent—whose interests may be adverse to those of the retarded person, Kentucky's practice of allowing third persons to participate as if parties in involuntarily committing mentally retarded adults violates due process.

The Sixth Circuit did not fail to heed this Court's instruction, in *Kremens* v. *Bartley*, to attend to the differences between the mentally ill and the mentally retarded, but properly inquired as to whether any such differences were rationally related to the differences in commitment procedures that the Cabinet sought to defend. Since it applies well-settled principles of due process and equal protection, is consistent with *Kremens* v. *Bartley*, and is in no conflict with other courts of appeals, the decision in this case raises no issue requiring further clarification by this Court and does not warrant this Court's review.

REASONS FOR DENYING THE WRIT

I. The Court of Appeals Decision Is Grounded in Long-Established Supreme Court Precedent Enunciating the Principles of Equal Protection and Due Process

1. The Court of Appeals for the Sixth Circuit decision that, in Kentucky, equal protection requires (1) that the reasonable doubt standard of proof must apply in proceed-

ings involuntarily to commit mentally retarded adults, and (2) that third persons must not be permitted to participate as if parties in involuntary commitment proceedings is grounded in long-established Supreme Court precedent enunciating the principles of equal protection. 7a. See *Baxstrom* v. *Herold*, 383 U.S. 107 (1966); *Jackson* v. *Indiana*, 406 U.S. 715 (1972). In lowering to clear and convincing the standard of proof for civil commitment of the mentally retarded, and in allowing third persons to participate as if parties, the 1990 legislative amendments denied to the mentally retarded protections afforded by state statute to the mentally ill.[12] In *City of Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), this Court clearly summarized the equal protection principles applicable to the mentally retarded:

> To withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose . . . The state may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.

473 U.S. at 446. The Sixth Circuit in *Doe* v. *Austin* previously recognized that "as a matter of fact, there are differences between the mentally ill and the mentally retarded," 848 F.2d at 1394 [*see, Kremens* v. *Bartley*, 431 U.S. 119, 135-36 (1977)], but pointed out that "the mere identification of

[12] *See Ky. Rev. Stat. Ann.* § 202A.076(2), which provides that, in hearings on the involuntary commitment of the mentally ill, "the manner of proceeding and rules of evidence shall be the same as those in any criminal proceeding, including the burden of proof beyond a reasonable doubt." No Kentucky statute permits intrusion of third persons on the commitment of the mentally ill.

differences is not enough; equal protection 'require[s] that a distinction made have some relevance to the purpose for which the classification is made.'" *Id.*, citing *Baxstrom* v. *Herold*, 383 U.S. 107, 111 (1966). *See Jackson* v. *Indiana*, 406 U.S. 715, 724 (1975). 34a-35a.

The Sixth Circuit again affirmed these well-established equal protection principles in holding that the "mentally ill and mentally retarded are identical insofar as they lose their personal liberty by involuntary institutionalization." 7a. Accordingly, the Court of Appeals properly held that mentally retarded adults in Kentucky are entitled to the same standard of proof as the mentally ill and that the state may not impose on the mentally retarded a greater burden than is imposed on the similarly situated mentally ill by permitting third persons to act as if parties in the commitment process. 7a. The Cabinet's argument that the circuit courts need further guidance on the principles of equal protection is groundless. The Sixth Circuit's decision is firmly based on well-settled principles of law.

2. As a factual matter, the Court of Appeals for the Sixth Circuit properly found that the Cabinet's assertions that there are several relevant differences between mentally ill and mentally retarded persons which provide a basis for the different standards of proof are unsupported by any evidence in the record:

> There is no evidence whatsoever to show that mentally retarded persons are not "stigmatized," or that the treatment that they receive is less "intrusive" than the treatment administered to mentally ill persons. There is also dispute as to whether mentally retarded persons can be treated so as to improve their condition.

6a. Moreover, the Court of Appeals correctly held that "the issue raised in this case relates to the *liberty* of the

mentally retarded persons who are threatened with involuntary commitment. Regardless of the asserted benefits of institutionalization, it nevertheless results in the loss of personal liberty." 6a. *See also Addington* v. *Texas*, 441 U.S. 418, 425-26 (1979); *Vitek* v. *Jones*, 445 U.S. 480, 491 (1980), quoting *Humphrey* v. *Cady*, 405 U.S. 504, 509 (1972).[13] The Sixth Circuit's holding that Kentucky must apply the reasonable doubt standard in involuntarily committing mentally retarded adults and that third persons may not participate in the proceeding as if parties flows from the application of established equal protection principles to the fact that Kentucky statute provides for a reasonable doubt standard, and does not provide for the participation of third persons, in involuntarily committing mentally ill adults. To the extent that it involves Kentucky law, the decision is

[13] It does not avail the petitioner simply to recite alleged differences between the mentally ill and the mentally retarded. Petition at 12, 13-16. Not all differences are relevant to the issue of differences in commitment standards. In considering what protections the mentally ill and mentally retarded must be afforded when they face involuntary institutionalization, the relevant factor is, as the Sixth Circuit correctly noted, the deprivation of liberty involved — a factor which is common to both groups. Although the Cabinet cannot point to evidence in the record to support the differences alleged, it may be acknowledged that differences exist. 5a-6a. However, since involuntary institutionalization is a deprivation of liberty by definition, the mentally ill and mentally retarded face the same threat in that regard — that is, they are similarly situated — and so are entitled to the same protections. Even were they supported by evidence, the differences alleged by the Cabinet are simply irrelevant to the question of what protections are appropriate and are, accordingly, not rationally related to differences in commitment standards. By way of contrast, the Sixth Circuit has ruled, and the respondents have not challenged the ruling, that a rational basis does exist for treating the mentally retarded differently from the mentally ill with respect to frequency of periodic review. 37a.

without relevance to other states; to the extent that it embodies established equal protection principles, it requires no further clarification by this Court. For these reasons, it does not warrant this Court's consideration.

3. In affirming the District Court's holding that Kentucky's practice of allowing third persons to participate as if parties in involuntarily committing mentally retarded adults violates due process, the Court of Appeals properly applied clearly established principles of due process enunciated in *Doe* v. *Austin*, 848 F.2d 1386 (6th Cir.), *cert. denied*, 488 U.S. 967 (1988):

> In *Austin*, we held that the decision to commit a mentally retarded adult is not within the discretion of his or her parents or guardians. Austin, 848 F.2d at 1386. Moreover, as recognized by the district court, these parties' interests may be adverse to the person facing commitment.

7a. *See also* 16a. Again, this holding by the Sixth Circuit presents no issue worthy of review by this Court.

II. The Court of Appeals Decision Is Not in Conflict With Any Other Court of Appeals Nor Does It Misapply This Court's Opinion in *Kremens* v. *Bartley*

1. The Court of Appeals relied on well-settled case law in holding that, in Kentucky, equal protection requires that the reasonable doubt standard of proof must apply in proceedings involuntarily to commit mentally retarded adults. 4a-7a. See *Baxstrom* v. *Herold*, 383 U.S. 107 (1966); *Jackson* v. *Indiana*, 406 U.S. 715 (1972); *Kremens* v. *Bartley*, 431 U.S. 119 (1977); *City of Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432 (1985). The Court of Appeals similarly relied on clearly established case law in finding that, in

Kentucky, allowing third persons to participate in the commitment proceeding for the mentally retarded violated equal protection and due process of the law. 7a.

In neither ruling is the Sixth Circuit in conflict with other circuits; in neither ruling does the Court of Appeals depart from long-established Supreme Court precedent.

2. The petitioner suggests that the Court of Appeals misapplied this Court's instructions to the lower federal courts set forth in *Kremens* v. *Bartley*, 431 U.S. 119 (1977), noting that this Court "cautioned a District Court to pay 'careful attention' to the difference between the mentally ill and the mentally retarded." Petition at 13.

The Sixth Circuit previously acknowledged that "as a matter of fact there are differences between the mentally ill and the mentally retarded." *Doe* v. *Austin*, 848 F.2d 1386, 1394 (6th Cir.), *cert. denied*, 488 U.S. 967 (1988). That fact is not in dispute. However, the petitioner continues to ignore the red flag of caution that the Sixth Circuit raised:

> The *mere identification of differences is not enough;* equal protection require[s] that a distinction made have some relevance to the purpose for which classification is made. Citing *Baxstrom* v. *Herold*, 383 U.S. 107, 111 (1966).

5a, 35a. (Emphasis added.) Petitioner asserts that "sufficient differences have been established between the mentally ill and the mentally retarded to permit the Kentucky General Assembly to draft the differing procedures for their admission to state-operated facilities . . ." Petition at 15-16. As the Sixth Circuit recognized, however, it is not enough, under the principles enunciated by this Court in *Baxstrom* v. *Herold*, to recite the differences. It is essential that such differences as exist are rationally related to

the differences in commitment procedures that the Cabinet seeks to defend. That is the threshold at which the petitioner balks. The Court of Appeals did not misapply *Kremens*. While it attended to the question of differences, in accordance with *Kremens*, the court found that those asserted by the petitioner were unsupported by any evidence in the record and that, in any event, none of the asserted differences justified institutionalizing the mentally retarded under more liberal standards than those applied to the mentally ill. The respondents submit that the petitioner raises no real issue of conflict among courts that deserves review by this Court.

CONCLUSION

The petition does not present any question which warrants review by this Court. The Court of Appeals for the Sixth Circuit properly found that equal protection requires the application of the same reasonable doubt standard of proof for the mentally retarded as is afforded the mentally ill and that equal protection and due process prohibit the intrusion of third persons as if parties in the commitment process of the mentally retarded, as of the mentally ill. This holding presents no conflict with the decisions of this Court or the Circuit Courts of Appeals. The Sixth Circuit ruling is expressly predicated on Kentucky statutes and will affect none other than the litigants. The petition for writ of certiorari should thus be denied.

Respectfully submitted,

By: /s/ Kelly A. Miller
Counsel of Record
902 W. Highland View Drive
Boise, ID 83702
(208) 336-1290

/s/ Ronald Marstin
Attorney at Law
Legal Aid Society, Inc.
425 W. Muhammad Ali Blvd.
Louisville, KY 40202
Attorneys for Respondents

Dated: September 24, 1992